
MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 11, 1996
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 11, 1996.

Commission:

Present: Colin Wied, Chairperson
Christine W.S. Byrd
Arthur K. Marshall
Edwin K. Marzec
Sanford Skaggs

Absent: Allan L. Fink, Vice Chairperson
Dick Ackerman, Assembly Member
Robert E. Cooper
Bion M. Gregory, Legislative Counsel
Quentin L. Kopp, Senate Member

Staff: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Barbara S. Gaal, Staff Counsel
Robert J. Murphy, Staff Counsel

Consultant: Melvin A. Eisenberg, Business Judgment & Derivative
Actions

Other Persons:

D. Steven Blake, State Bar Business Law Section, Corporations Committee,
Sacramento
Herb Bolz, Office of Administrative Law, Sacramento
Dorothy Bacskai Egel, State Personnel Board, Sacramento
Diane Frankle, State Bar Business Law Section, Corporations Committee, Palo Alto
Dugald Gillies, Fair Oaks
Reed R. Kathrein, Milberg, Weiss, Bershad, Hynes & Lerach, San Francisco
Evelyn Lewis, Law Professor, UC Davis, State Bar Business Law Section,
Corporations Committee, Davis
Marlys Huez, Department of Health Services, Sacramento
Stephen Pickett, Southern California Edison, Rosemead

Madeline Rule, Department of Motor Vehicles, Sacramento
Erik Saltmarsh, California Energy Commission, Sacramento
Janice Shaw, California Correctional Peace Officers Association, West Sacramento

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MINUTES OF JUNE 13, 1996, COMMISSION MEETING

The Minutes of the June 13, 1996, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Election of Officers

The Commission considered Memorandum 96-45, relating to election of officers for 1996-97. The Commission elected Allan Fink as Chairperson and Christine W. S. Byrd as Vice Chairperson. Their terms of office commence September 1, 1996.

Report of Executive Secretary

The Executive Secretary reported that the Commission's budget augmentation looks very promising in the Legislature, thanks to the efforts of Senator Kopp, and also appears to be OK in the Governor's office. If it is enacted, the Commission will be in a position to have an administrative assistant again (freeing up the legal staff from these time-consuming duties) and to hire an attorney. The additional legal help appears particularly important in light of the

new major studies being given to the Commission by the Legislature. See discussion in these Minutes under “1996 Legislative Program”.

The Executive Secretary requested that Commissioners with outstanding travel claims act promptly to get the claims in to the office so that we can close out the 1995-96 fiscal year accounting.

The Executive Secretary reported that he had appeared before a legislative conference committee at the request of the committee to describe the Commission’s activities in the area of administrative procedure. The conference committee is looking at possible reforms of Public Utilities Commission procedures.

The Executive Secretary reported that Professor Preble Stolz of UC Berkeley Law School, a Commission consultant on administrative procedure, had died recently.

No Commission action was taken on these matters.

Consultant Contract

The Executive Secretary reported that Office of Administrative Law had identified a possible academic consultant on administrative rulemaking. That person is Professor Gregory S. Weber of McGeorge Law School. The Executive Secretary circulated Professor Weber’s resume and reported on a telephone interview with him.

The Commission approved a contract with Professor Gregory S. Weber to serve as an expert consultant on the administrative rulemaking study. The contract should provide for his travel expenses plus compensation of \$100 per diem for attending meetings and hearings at the Commission’s request.

1996 LEGISLATIVE PROGRAM

The Commission considered Memorandum 96-46 relating to its 1996 legislative program. The Commission also considered the First Supplement to Memorandum 96-46 reporting on the failure of the homestead exemption bill in the Assembly Judiciary Committee. The staff updated this material with the following information:

SB 794 (Kopp) — Administrative Adjudication Followup

The bill is pending on the Assembly Floor this day. Assemblyman Ackerman will be handling it.

SB 1510 (Kopp) — Civil Procedure

The bill now contains only a few remnants of the Commission's recommendation on tolling the statute of limitations when the defendant is out of state; the major part of the recommendation will be reintroduced next session in the Assembly. The bill was approved by the Assembly Judiciary Committee on July 10.

SCR 43 (Kopp) — Authority to Study Topics

The resolution of authority continues authority to recommend statutory revisions for trial court unification. Senator Lockyer's office indicates that there is an expectation that the Commission will act on this if SCA 4 is enacted. This would need to be done on an expedited basis, since SCA 4 does not include a deferred operative date. It could be done in two-phases — (1) a quick-fix band-aid statute to facilitate operation of unified courts, and (2) a longer-term thorough statutory revision.

The Senate added to the resolution of authority a study to consolidate the state environmental statutes. Assemblyman Ackerman's inquiries to key people in the Assembly indicate there is agreement that this project should be done.

STUDY B-601 – BUSINESS JUDGMENT RULE

The Commission considered Memorandum 96-52 and its First Supplement, relating to the business judgment rule. The staff also read excerpts from the Court of Appeal opinion in *Briano v. Rubio*, 96 Daily Journal D.A.R. 7617 (June 28, 1996), illustrating a confused perception of the business judgment rule.

The Commission decided to continue work on this study. In this connection, the staff should report back on the activities of the blue ribbon panel established by Senator Lockyer that is reviewing securities and derivative action litigation reform.

The Commission directed the staff to bring back for review a revised draft that takes into account issues in an anticipated letter from the State Bar Committee and that includes the following features:

(1) The draft should attempt to cover both issues of director liability and issues of setting aside and enjoining corporate action. The staff should work with the State Bar Committee in developing appropriate language for this purpose.

(2) The draft should address the issue of liability of an interested director who does not participate in a decision by disinterested directors. This may be better

addressed in the context of the duty of directors than in the context of the business judgment rule. In this connection, the staff should consult Corporations Code Section 310.

(3) The staff should consider the question whether, in the definition of an “interested director”, the references to “familial” relationships need to be limited and harmonized with the references to “associates”. The staff should also consider whether the draft needs to be revised to make more clear or explicit the discretion in the court to adjust for technical interests that ought not to be disqualifying, perhaps by an introductory clause to that effect; the staff should consider State Bar Committee suggested language on this matter.

(4) The technical suggestions made by Brad Clark in the First Supplement should be incorporated in the draft.

STUDY K-410 – SETTLEMENT NEGOTIATION CONFIDENTIALITY

The Commission considered Memorandum 96-40. The Commission’s preliminary inclination is to broadly protect the confidentiality of settlement negotiations: (1) protection should not be limited to proof of liability, (2) protection should apply in an arbitration, administrative adjudication, mini-trial, civil case, or other noncriminal proceeding, (3) the law should restrict discoverability of settlement communications, as well as admissibility, and (4) quite possibly the protection should be categorized as a privilege. The staff should explore these concepts and prepare a draft of a tentative recommendation.

STUDY K-501 – BEST EVIDENCE RULE

The Commission considered Memorandum 96-53 and the attached draft recommendation. The staff should revise the draft as follows:

(1) The new version should incorporate Section 1520(c) from page 11 of Memorandum 96-53, not Section 1520.5 from page 14 of that memorandum.

(2) There should be a grammatical change in the Comment to Section 1520. In the last sentence of the third paragraph, the reference to “whether discovery was reasonably diligent,” should be changed to “whether discovery was conducted in a reasonably diligent manner,” or something similar.

(3) In Section 1520(f), “secondary evidence rule” should be changed to “Secondary Evidence Rule.” The staff should revise Section 1520 such that the

term “Secondary Evidence Rule” applies only to the portions of the statute governing use of secondary evidence to prove the content of a writing.

(4) The new version should make clear that there are three grounds for exclusion of secondary evidence in a criminal case. The ground set forth in Section 1520(c) is in addition to, not instead of, the two grounds listed in Section 1520(b).

(5) The new version should make clear that the term “unfair,” which appears in Section 1520(b)(2), has previously been interpreted in the context of Section 1511 (to be repealed) and Rule 1003 of the Federal Rules of Evidence.

(6) The new version should incorporate the intermediate alternative of Section 1521.

The staff should solicit input on Section 1520(c) from Professor Uelmen, the California District Attorneys Association, and the Los Angeles District Attorneys Association (attention: William Hodgeman). Subject to favorable input from those sources and incorporation of the above revisions, the Commission approved the draft as its final recommendation. If the staff receives unfavorable comments on Section 1520(c), it should bring them to the Commission’s attention for further consideration.

STUDY L-4000 – HEALTH CARE DECISIONS

The Commission considered Memorandum 96-39, and the First Supplement thereto, relating to health care decisions. The Commission gave general approval of the proposals in the memorandum: (1) to relocate the Natural Death Act (or its successor) to the Probate Code, associated with the durable power of attorney for health care, (2) to consider providing for statutory surrogate health care decisionmaking for incapacitated adults, starting with the model of the new Uniform Health Care Decisions Act, and (3) to attempt to make execution and witnessing requirements more consistent throughout the related health care decisionmaking statutes.

STUDY N-111 – ETHICAL STANDARDS FOR ADMINISTRATIVE LAW JUDGES

The Commission considered Memorandum 96-48 and the attached draft of a recommendation relating to ethical standards for administrative law judges. The Commission made the following decisions on this matter.

Political Activities of ALJs

After extended discussion of the concept of applying to administrative law judges the same limitations on political activities that apply to judicial officers, the Commission requested further staff research on the extent to which judicial officers may engage in political activities related to their own salaries, benefits, and working conditions.

Exceptions from Code of Judicial Ethics

The Commission asked the staff to bring back for further Commission consideration the exceptions to the Code of Judicial Ethics we have previously identified for administrative law judges (but not including the jury trial exception). In this connection, the staff should review application of the Code of Judicial Ethics to temporary judges, as well as the effect of agency incompatible activities statements.

More Concrete Ethical Standards

The Commission adopted the Comment language set out in the memorandum to the effect that the ethical standards supplement other applicable rules of conduct and that interpretations of the judicial code apply to the administrative law judge code.

Enforcement of Violations

The staff should verify with the State Personnel Board that if a violation of the ethical standards is ground for disciplinary action under Government Code Section 19572, the Personnel Board would be willing and able to take enforcement action should the hiring agency decline to do so.

STUDY N-115 – AUTHORITY OF ADMINISTRATIVE LAW JUDGE TO SOLEMNIZE MARRIAGE

The Commission considered Memorandum 96-49, relating to the authority of the administrative law judge to solemnize a marriage. The Commission decided not to recommend any change in existing law on this matter.

STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission noted Memorandum 96-51, relating to conforming revisions for the revised tentative recommendation on judicial review of agency action, which was presented for information. The staff reported that it will try to have

conforming revisions published in a preprint bill to make it easier for agencies and interested persons to review the material.

APPROVED AS SUBMITTED

Date

APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Chairperson

Executive Secretary